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No. 09-1213

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TIMOTHY CHARLES LAMB,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,
STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The issue presented for review is: Whether the Petitioner's rights under the due process clause of the Fourteen Amendment to the United States Constitution are implicated by the opinion below or by application of Rule 13(A) of North Dakota's Admission to Practice Rules.

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STATEMENT OF JURISDICTION

This court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioner was a candidate for the February 2008 bar examination as administered by Respondent. Based on the results of his examination, Respondent recommended to the North Dakota Supreme Court that Petitioner not be admitted to the Bar of North Dakota. Petitioner then requested a formal hearing under North Dakota's Admission to Practice Rules. Prior to that hearing taking place, Petitioner sought discovery of certain information concerning, *inter alia*, scoring methodology and procedures used to train examination graders.[1] Petitioner's request was denied, but he was

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1. Specifically, Petitioner sought information pertaining to: (1) grading techniques; (2) how raw scores are converted; (3) whether the Board performs periodic assessments of its scores; (4) whether a report is available of psychometric procedures; (5) whether the Board has an ongoing assessment of its procedures; (6) what practices the Board uses in maintaining acceptable standards; (7) how the essay scoring judges are trained; (8) whether a content analysis has been conducted to measure the relationship between questions and competency in the legal profession; and (9) security measures and related bar examination information.

provided certain information concerning grading guidelines and selection of test questions.[2]

Petitioner then moved for a writ of mandamus in the trial court claiming the information he sought was subject to North Dakota's open records law, codified at N.D. Cent. Code Ch. 44-04 *et. seq.* The trial court refused to issue the writ. Notably, Petitioner did not raise any due process argument in the trial court. Petitioner then appealed to the North Dakota Supreme Court, which affirmed the trial court. *Lamb v. State Bd. of Law Examiners*, 2010 ND 11 ¶ 1, 777 N.W.2d 343. The North Dakota Supreme Court held Petitioner did not have a clear legal right to the information he sought under North Dakota law and, therefore, the trial court had not misapplied the law when it denied Petitioner's request for a writ of mandamus. Notably, the North Dakota Supreme Court concluded the trial court had not misapplied the law because the admission to practice rules governing admission to the Bar of North Dakota were neither subordinate to North Dakota's open records law nor unconstitutional under the North Dakota Constitution. This request for writ of certiorari followed.

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2. Specifically, Respondent provided information pertaining to: (1) selection and preparation of graders; (2) grading guidelines given to graders; (3) selection of test questions; (4) how often the pass fail policy is reviewed; (5) where the conversion and scaling of scores are performed; and (6) where the Multistate Performance Test and Multistate Essay Examination questions are prepared.

REASONS FOR DENYING THE PETITION

The Petitioner seeks a writ of certiorari from the 2010 decision of the North Dakota Supreme Court, which held he had no clear legal right under North Dakota law to information he sought concerning procedures surrounding the administration of the February 2008 bar examination.

The petition for certiorari should be denied in the first instance because the decision of the North Dakota Supreme Court did not decide an important federal question. Rather, the decision involved an issue of state law. Petitioner has not demonstrated that there is a conflict in the decisions announced from other courts of last report or among the United States courts of appeal warranting a grant of certiorari. Petitioner has not demonstrated he has been deprived of a property right, nor has Petitioner demonstrated he has been deprived of fair process. The North Dakota Admission to Practice Rules are not vague or overbroad so as to be unconstitutional. Finally, the opinion below did not decide an important unsettled question of federal law or an important question of federal law that conflicts with decisions of this Court. For these reasons, certiorari is not warranted.

I. The Opinion Below did not Decide an Important Federal Question in a Way that Conflicts with Another State Court of Last Resort or United States Court of Appeal Opinion

The opinion below addressed Petitioner's argument that Rule 13 of North Dakota's Admission to Practice Rules was "subordinate" to Section 44-04-18 of the North Dakota Century Code, or that it was unconstitutional under Article XI, Section 6 of the North Dakota Constitution. Petitioner urged that since the rule was either "subordinate" or unconstitutional, the trial court had misapplied North Dakota law concerning the issuance of a writ of mandamus. *See* N.D. Cent. Code § 32-34-01 (governing the issuance of a writ of mandamus under North Dakota law).

Petitioner has not cited any other state court of last resort with which the opinion below conflicts. Nor has Petitioner cited any court of appeal decision that conflicts with the opinion below. In fact, the Court of Appeals for the Eight Circuit decided a case very similar to the one here. In *Fields v. Kelly*, 986 F.2d 225, 227 (8th Cir. 1992) a failed bar applicant, Fields, sued the North Dakota Bar Board claiming it had deprived him of due process. Fields was provided copies of the North Dakota essay questions, model answers and copies of his own answers. *Id.* at 227. He was also provided with copies of the multistate examination and his answers. *Id.* The court rejected his due process argument. Noting that Fields' "due process argument varies from the usual argument of the disappointed bar applicant" in that Fields sought access to "public records," the court held that no process had been denied him. *Id.* at 228.

Other courts of appeal cases have held that failed bar applicants have limited rights to information concerning the bar examination. For example, in *Davidson v. State of Georgia*, 622 F.2d 895 (5th Cir. 1980) the court rejected an applicant's contention that he was deprived of due process by the Georgia board of law examiners. *Id.* at 876; *see also Brewer v. Wegmann*, 691 F.2d 216 (5th Cir. 1982), cert. denied 461 U.S. 908. Similarly, in *Whitfield v. Ill. Bd. of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) a due process attack was rejected. The court noted that admission to the bar of a state is "primarily a matter of state concern" and that a federal court is not justified in interfering with a board charged with determining which individuals have the requisite knowledge and skill to practice unless there is proof that the determination was made based on a constitutionally impermissible reason. *Id.* at 477 (citing *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 248 (1957) and *Douglas v. Noble*, 261 U.S. 165 (1923)). In *Sutton v. Lionel*, 585 F.2d 400, 402 (9th Cir. 1978) the court recognized a failed applicants right to inspect his own examination, but denied his petition for other relief such as a hearing before the bar examiners, for model answers to his examination, and for a representative sampling of other applicants examination papers and concluded he was not denied due process. *Id.* at 403. *See also Giannini v. Real*, 911 F.2d 354, 357 (9th Cir. 1990)(holding that applicant was not denied due process).

State court opinions have similar reasoning. E.g., *Taylor v. Safly*, 637 S.W.2d 578 (Ark. 1982); *In re Mead*, 361 N.E.2d 403 (Mass. 1977).

As these cases illustrate, there is no conflict among the courts of appeal or among the state courts of last result. Petitioner has not advanced any authority to the contrary.

II. The Opinion Below did not Decide an Important Unsettled Question of Federal Law or an Important Question of Federal Law that Conflicts with Decisions of this Court

There can be no question that the opinion below was decided on state law grounds. *Lamb*, *supra*, at ¶ 5, 777 N.W.2d at 345. Accordingly, only if the opinion below conflicts with decisions of this Court is certiorari warranted.

A. No Authority Supports Petitioner's Argument that he has been Deprived of a Property Right

Petitioner nevertheless argues his procedural due process rights have been infringed insofar as the opinion below did not permit him access to information sought from Respondent. To be sure, if a legitimate liberty or property interest is being taken, the due process clause may be implicated in certain circumstances. Here, however, Petitioner has failed to cite any precedent standing for the proposition that his due process rights have been infringed or that the opinion below is in conflict with decisions of this Court. Tellingly, Petitioner alleges the right he allegedly has been deprived of is the "right to access public record information" in connection with the February 2008 bar examination. In effect, Petitioner argues that he has a "right" to access information that has been classified as confidential

under North Dakota's Admission to Practice Rules. Petitioner cites no authority that squarely supports this proposition.

While it is well settled that "property" includes more than personal belongings or money, it is not enough to have an abstract need or desire for a benefit. Instead, Petitioner must demonstrate that he has a legitimate claim or entitlement to his claimed benefit under state or federal law. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). The jurisprudence of this Court has established, for example, that there is a "property" interest in public education when school attendance is required. *Goss v. Lopez*, 419 U.S. 565 (1975). Similarly, under certain circumstances, an individual can have a "property" interest in welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970). There may also be a "property" interest in continued public employment. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Petitioner cites no persuasive precedent for his argument the abstract desire to review "public record information" involves a "property" right under the due process clause. Instead, Petitioner cites *Marshall v. Jerrico, Inc.*, 446 US 238 (1980) and argues that the due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. With this proposition Respondent has no quarrel. Petitioner certainly has not demonstrated that the tribunal in this case was not impartial or disinterested. Quite clearly, *Marshall v. Jerrico*, *supra*, has no application here. Instead, Petitioner simply complains that his right to due process was "deprived" because he was denied information that is in the "public domain."

Petitioner relies on *Greene v. McElroy*, 360 U.S. 474 (1959) for the proposition that the revocation of a security clearance (which resulted in termination of employment) is analogous to his case. Petitioner's argument is misplaced. First, the Court in *Greene, supra*, was confronted with a petitioner who had been granted a security clearance by the government and which the government later revoked. *Id.* at 476. While the Court noted that the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment[,]" the Court was primarily concerned with the lack of opportunity for confrontation and cross-examination provided to the petitioner. *Id.* at 492-93 (citing *Dent v. State of West Va.*, 129 U.S. 114 (1889); *Schware v. Bd. of Law Examiners*, 353 U.S. 232 (1957)). Here Petitioner has been deprived of no such opportunity despite urging the contrary. Petitioner has been provided with certain information concerning the administration of the examination. Importantly, the facts discussed in *Greene* which Petitioner points to are absent here. Certainly had Petitioner been admitted to the bar and subsequently had his license revoked without the benefit of a hearing with cross examination he would be better served to advance *Greene*. But those facts are absent here. Petitioner has not yet even had the formal hearing he requested. There is no conflict with the Court's holding in *Greene* and the opinion below.

Petitioner also advances *Zinermon v. Burch*, 494 U.S. 113 (1989) and *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991) claiming the opinion below is in conflict with these decisions. Petitioner's arguments are unavailing.

First, *Zinermon, supra*, involved the deprivation of liberty when Burch was admitted to a psychiatric hospital without adequate pre-deprivation safeguards. *Id.* at 115. The Court granted certiorari to resolve a conflict in the courts of appeal arising from the scope of a rule announced in *Parratt v. Taylor*, 451 U.S. 527 (1981). No such conflict is evident here.

Similarly, *Brewer v. Chauvin, supra*, does not aid Petitioner. In that opinion a deputy sheriff had been terminated from his employment without a hearing. *Id.* at 862. The deputy then filed a 42 U.S.C. § 1983 action. The issues in the case were whether the back pay awarded to the deputy was erroneously awarded since the district court did not conduct an evidentiary hearing on the issue. The opinion does not stand for the proposition that due process requires access to information that is confidential under law.

Petitioner's arguments are clearly unavailing insofar as he has not demonstrated that he is entitled, as a "property" right, to confidential information. For these reasons, the Petition should be denied.

B. No Authority Establishes Petitioner has been Deprived of "Process."

It is well established that a deprivation of liberty or property by government must be conducted in accordance with fundamental notions of fairness. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(involving deprivation of social security disability benefits); *Goldberg v. Kelly, supra*, at 262 (involving termination of welfare benefits); *Cleveland Bd. of Ed. v. Loudermill*,

470 U.S. 532, 538 (1985)(termination of public school employees)).

Here, however, Petitioner does not claim that he has been denied the opportunity to appear before Respondent in connection with his application to North Dakota's bar. Rule 10(B), N.D. Admission to Practice R. This is as it must be, since the hearing pursuant to North Dakota's admission to practice rules has not taken place yet. Petitioner acknowledges this fact. It follows, then, that Petitioner has not been denied any "process" under law.

C. No Authority Supports Petitioner's Argument that Rule 13 of North Dakota's Admission to Practice Rules is so Vague or Overbroad as to be Unconstitutional

Petitioner asserts that Rule 13(A) of North Dakota's Admission to Practice Rules is vague and overbroad. That rule provides, in relevant part, that "[a]ll records maintained by the Board regarding applications for admission to practice law, *all examination materials*, and all proceedings by the Board shall be confidential except as provided by [the admission to practice rules]." Rule 13(A), N.D. Admission to Practice R. (emphasis added).

The opinion below by the North Dakota Supreme Court analyzed the purpose and authority for the rule. *Lamb*, *supra*, at ¶ 7. 777 N.W.2d at 346. First, the opinion noted that the North Dakota constitution delegated authority to the supreme court to promulgate rules regarding the admission of attorneys to the bar. *Id.*

Under that authority the supreme court promulgated the admission to practice rules. The North Dakota legislature has also recognized the supreme court's authority to admit attorneys to the bar. *Id.* at ¶ 9, 777 N.W.2d at 348 (citing N.D. Cent. Code § 27-11-02). The opinion reasoned that the approach taken by the legislature when it enacted North Dakota's open records law, N.D. Cent. Code ch. 44-04 *et. seq.*, was not inconsistent with the admission to practice rules and in particular Rule 13(A). *Id.* at ¶ 11, 777 N.W.2d at 350. Since Rule 13(A) mandates that all examination materials are confidential, Petitioner was not entitled to certain information concerning the administration of the February, 2008 bar examination. *Id.*

Despite the well reasoned opinion below, and the plain and unambiguous language of Rule 13(A), Petitioner argues that Rule 13(A) is "void because it does not give adequate notice of the public records access policy . . . to an applicant who appeals his bar exam results . . . ." Petition at p. 18. This argument is without merit. Rule 13(A) clearly and unambiguously states that "all examination materials" will be confidential.[3] It is therefore a stretch to argue that an

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3. It should be also noted that the approach taken by Rule 13(A) is consistent with North Dakota's open records law which also exempts examination questions and procedures. N.D. Cent. Code § 44-04-18.8. That statute provides:

> The following records are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: examination or test questions, scoring keys, and other data used to administer any

(Cont'd)

applicant to the bar of North Dakota does not have notice as to what is considered public record.

Petitioner also claims that the rule is void because "it prohibits 'constitutionally protected' conduct" in that it "prohibits information that should not be considered 'confidential' and denies access during a formal hearing." Petition at p. 18. The confusing logic and unconnected reasoning of this argument underscores its weakness. Petitioner points to no "conduct" that is "protected" in support of his petition. Instead, Petitioner asserts simply that Rule 13(A) is in conflict with *Nat'l Assoc. Advancement of Colored People v. Button*, 371 U.S. 415 (1963), *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Smith v. Goguen*, 415 U.S. 556 (1974) and *Palmer v. City of Euclid, Ohio*, 402 U.S. 544 (1971).

Nat'l Assoc. Advancement of Colored People v. Button, *supra*, involved the free expression of speech, not the deprivation of due process in circumstances similar to this case. Accordingly, that case is not applicable to the petition. Similarly, *Grayned v. City of Rockford*, *supra*, does not advance Petitioner's arguments. In that opinion, the Court did note that "a basis principal of due process [is] that an enactment is

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(Cont'd)

> licensing, employment, academic, or certification examination or test, if the examination or test is to be used again in whole or in part; and records establishing examination or test procedures and instructions regarding the administration, grading, or evaluation of any examination or test, if disclosure may affect scoring outcomes.

void for vagueness if its prohibitions are not clearly defined." *Id.* at 108. But the Court also noted that "we can never expect mathematical certainly from our language." *Id.* at 110. The Court found that the ordinance at issue in *Grayned* was clear as to what conduct it prohibited. *Id.* No imprecision that was present in the ordinance at issue in *Grayned* is present here. *Id.* at 111. For these reasons, Grayned does not advance Petitioner's cause.

Similarly, *Smith v. Goguen*, *supra*, is also inapplicable. In that opinion, the Court found that a provision of a Massachusetts statute was void for vagueness under the due process clause. *Id.* at 567-68. The Court reached its decision because the Massachusetts statue infringed on expressions sheltered by the first amendment. *Id.* at 573. No such claim is made by Petitioner here. Moreover, unlike *Smith*, which prohibited anyone from publicly treating the flag of the United States "contemptuously", no such vague language is evident in Rule 13 of the North Dakota Admission to Practice Rules. For the same reasons, *Palmer v. City of Euclid, Ohio*, *supra*, is also inapplicable. In that case, the Court found that a criminal statute was unconstitutionally vague on its face. *Id.* at 545. No such vagueness is present here. The statute in *Palmer* gave insufficient notice to an average person that his conduct was impermissible under the statute. Here, of course, the situation is wholly dissimilar. Rule 13 of North Dakota's Admission to Practice Rules clearly and unambiguously prohibits the release of all examination materials. It adequately gives notice to applicants to the bar about what information is confidential. *Palmer* has no application here.

CONCLUSION

The petition for certiorari should be denied in the first instance because the decision of the North Dakota Supreme Court did not decide an important federal question. Rather, the decision involved an issue of state law. Petitioner has not demonstrated that there is a conflict in the decisions announced from other courts of last report or among the United States courts of appeal warranting a grant of certiorari. Petitioner has not demonstrated he has been deprived of a property right, nor has Petitioner demonstrated he has been deprived of fair process. The North Dakota Admission to Practice Rules are not vague or overbroad so as to be unconstitutional. Finally, the opinion below did not decide an important unsettled question of federal law or am important question of federal law that conflicts with decisions of this Court. For these reasons, certiorari is not warranted.

Respectfully submitted,

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